

AMENDED IN SENATE JUNE 14, 2011

CALIFORNIA LEGISLATURE—2011–12 FIRST EXTRAORDINARY SESSION

ASSEMBLY BILL

No. 28

Introduced by Assembly Member Blumenfield

May 19, 2011

An act relating to the Budget Act of 2011. An act to amend Section 6203 of the Revenue and Taxation Code, relating to taxation, and making an appropriation therefor, to take effect immediately, bill related to the budget.

LEGISLATIVE COUNSEL’S DIGEST

AB 28, as amended, Blumenfield. ~~Budget Act of 2011. State Board of Equalization: administration: retailer engaged in business in this state.~~

The Sales and Use Tax Law imposes a tax on retailers measured by the gross receipts from the sale of tangible personal property sold at retail in this state, or on the storage, use, or other consumption in this state of tangible personal property purchased from a retailer for storage, use, or other consumption in this state, measured by sales price. That law defines a “retailer engaged in business in this state” to include retailers that engage in specified activities in this state and requires every retailer engaged in business in this state and making sales of tangible personal property for storage, use, or other consumption in this state to register with the State Board of Equalization and to collect the tax from the purchaser and remit it to the board.

This bill would further define a retailer engaged in business in this state as a retailer that has substantial nexus with this state and a retailer upon whom federal law permits the state to impose a use tax collection

duty. The bill would also include specified retailers as retailers engaged in business in this state and would eliminate an exclusion.

This bill would include in the definition of a retailer engaged in business in this state any retailer entering into agreements under which a person or persons in this state, for a commission or other consideration, directly or indirectly refer potential purchasers, whether by an Internet-based link or an Internet Web site, or otherwise, to the retailer, provided the total cumulative sales price from all sales by the retailer to purchasers in this state that are referred pursuant to these agreements is in excess of \$500,000 within the preceding 12 months, except as specified. This bill would also provide that a retailer entering specified agreements to purchase advertising is not a retailer engaged in business in this state. This bill would further provide that these provisions would not apply if the retailer can demonstrate that the referrals would not satisfy specified United States constitutional requirements.

This bill would also include as a retailer engaged in business in this state as a retailer that is a member of a commonly controlled group, as defined under the Corporation Tax Law, and a member of a combined reporting group, as defined, that includes another member of the retailer's commonly controlled group that, pursuant to an agreement with or in cooperation with the retailer, performs services in this state in connection with tangible personal property to be sold by the retailer.

This bill would provide that the provisions of this bill are severable.

This bill would appropriate \$1,000 from the General Fund to the State Board of Equalization for administrative operations.

The California Constitution authorizes the Governor to declare a fiscal emergency and to call the Legislature into special session for that purpose. Governor Schwarzenegger issued a proclamation declaring a fiscal emergency, and calling a special session for this purpose, on December 6, 2010. Governor Brown issued a proclamation on January 20, 2011, declaring and reaffirming that a fiscal emergency exists and stating that his proclamation supersedes the earlier proclamation for purposes of that constitutional provision.

This bill would state that it addresses the fiscal emergency declared and reaffirmed by the Governor by proclamation issued on January 20, 2011, pursuant to the California Constitution.

This bill would declare that it is to take immediate effect as a bill providing for appropriations related to the Budget Bill.

This bill would express the intent of the Legislature to enact statutory changes relating to the Budget Act of 2011.

The California Constitution authorizes the Governor to declare a fiscal emergency and to call the Legislature into special session for that purpose. Governor Schwarzenegger issued a proclamation declaring a fiscal emergency, and calling a special session for this purpose, on December 6, 2010. Governor Brown issued a proclamation on January 20, 2011, declaring and reaffirming that a fiscal emergency exists and stating that his proclamation supersedes the earlier proclamation for purposes of that constitutional provision.

This bill would state that it addresses the fiscal emergency declared and reaffirmed by the Governor by proclamation issued on January 20, 2011, pursuant to the California Constitution.

Vote: majority. Appropriation: ~~no~~ yes. Fiscal committee: ~~no~~ yes. State-mandated local program: no.

The people of the State of California do enact as follows:

1 ~~SECTION 1. It is the intent of the Legislature to enact statutory~~
2 ~~changes relating to the Budget Act of 2011.~~

3 ~~SECTION 1. Section 6203 of the Revenue and Taxation Code~~
4 ~~is amended to read:~~

5 6203. (a) Except as provided by Sections 6292 and 6293, every
6 retailer engaged in business in this state and making sales of
7 tangible personal property for storage, use, or other consumption
8 in this state, not exempted under Chapter 3.5 (commencing with
9 Section 6271) or Chapter 4 (commencing with Section 6351),
10 shall, at the time of making the sales or, if the storage, use, or other
11 consumption of the tangible personal property is not then taxable
12 hereunder, at the time the storage, use, or other consumption
13 becomes taxable, collect the tax from the purchaser and give to
14 the purchaser a receipt therefor in the manner and form prescribed
15 by the board.

16 (b) As respects leases constituting sales of tangible personal
17 property, the tax shall be collected from the lessee at the time
18 amounts are paid by the lessee under the lease.

19 (c) “Retailer engaged in business in this state” as used in this
20 section and Section 6202 means ~~and includes~~ any retailer that has
21 substantial nexus with this state for purposes of the commerce
22 clause of the United States Constitution and any retailer upon

1 *whom federal law permits this state to impose a use tax collection*
2 *duty. “Retailer engaged in business in this state” specifically*
3 *includes, but is not limited to, any of the following:*

4 (1) Any retailer maintaining, occupying, or using, permanently
5 or temporarily, directly or indirectly, or through a subsidiary, or
6 agent, by whatever name called, an office, place of distribution,
7 sales or sample room or place, warehouse or storage place, or other
8 place of business.

9 (2) Any retailer having any representative, agent, salesperson,
10 canvasser, independent contractor, or solicitor operating in this
11 state under the authority of the retailer or its subsidiary for the
12 purpose of selling, delivering, installing, assembling, or the taking
13 of orders for any tangible personal property.

14 (3) As respects a lease, any retailer deriving rentals from a lease
15 of tangible personal property situated in this state.

16 ~~(4) (A) Any retailer soliciting orders for tangible personal~~
17 ~~property by mail if the solicitations are substantial and recurring~~
18 ~~and if the retailer benefits from any banking, financing, debt~~
19 ~~collection, telecommunication, or marketing activities occurring~~
20 ~~in this state or benefits from the location in this state of authorized~~
21 ~~installation, servicing, or repair facilities.~~

22 ~~(B) This paragraph shall become operative upon the enactment~~
23 ~~of any congressional act that authorizes states to compel the~~
24 ~~collection of state sales and use taxes by out-of-state retailers.~~

25 ~~(5) Notwithstanding Section 7262, a retailer specified in~~
26 ~~paragraph (4) above, and not specified in paragraph (1), (2), or (3)~~
27 ~~above, is a “retailer engaged in business in this state” for the~~
28 ~~purposes of this part and Part 1.5 (commencing with Section 7200)~~
29 ~~only.~~

30 ~~(d) (1) For purposes of this section, “engaged in business in~~
31 ~~this state” does not include the taking of orders from customers in~~
32 ~~this state through a computer telecommunications network located~~
33 ~~in this state which is not directly or indirectly owned by the retailer~~
34 ~~when the orders result from the electronic display of products on~~
35 ~~that same network. The exclusion provided by this subdivision~~
36 ~~shall apply only to a computer telecommunications network that~~
37 ~~consists substantially of online communications services other~~
38 ~~than the displaying and taking of orders for products.~~

39 ~~(2) This subdivision shall become inoperative upon the operative~~
40 ~~date of provisions of a congressional act that authorize states to~~

1 ~~compel the collection of state sales and use taxes by out-of-state~~
2 ~~retailers.~~

3 (4) Any retailer that is a member of a commonly controlled
4 group, as defined in Section 25105, and is a member of a combined
5 reporting group, as defined in paragraph (3) of subdivision (b) of
6 Section 25106.5 of Title 18 of the California Code of Regulations,
7 that includes another member of the retailer's commonly controlled
8 group that, pursuant to an agreement with or in cooperation with
9 the retailer, performs services in this state in connection with
10 tangible personal property to be sold by the retailer, including,
11 but not limited to, design and development of tangible personal
12 property sold by the retailer, or the solicitation of sales of tangible
13 personal property on behalf of the retailer.

14 (5) (A) Any retailer entering into an agreement or agreements
15 under which a person or persons in this state, for a commission
16 or other consideration, directly or indirectly refer potential
17 purchasers of tangible personal property to the retailer, whether
18 by an Internet-based link or an Internet Web site, or otherwise,
19 provided that the total cumulative sales price from all of the
20 retailer's sales, within the preceding 12 months, of tangible
21 personal property to purchasers in this state that are referred
22 pursuant to all of those agreements with a person or persons in
23 this state, is in excess of five hundred thousand dollars (\$500,000).

24 (B) An agreement under which a retailer purchases
25 advertisements from a person or persons in this state, to be
26 delivered on television, radio, in print, on the Internet, or by any
27 other medium, is not an agreement described in subparagraph
28 (A), unless the advertisement revenue paid to the person or persons
29 in this state consists of commissions or other consideration that
30 is based upon sales of tangible personal property.

31 (C) Notwithstanding subparagraph (B), an agreement under
32 which a retailer engages a person in this state to place an
33 advertisement on an Internet Web site operated by that person, or
34 operated by another person in this state, is not an agreement
35 described in subparagraph (A), unless the person entering the
36 agreement with the retailer also directly or indirectly solicits
37 potential customers in this state through use of flyers, newsletters,
38 telephone calls, electronic mail, blogs, microblogs, social
39 networking sites, or other means of direct or indirect solicitation
40 specifically targeted at potential customers in this state.

1 (D) *This paragraph shall not apply if the retailer can*
2 *demonstrate that the person in this state with whom the retailer*
3 *has an agreement did not engage in referrals in the state on behalf*
4 *of the retailer that would satisfy the requirements of the commerce*
5 *clause of the United States Constitution.*

6 ~~(e)~~

7 (d) Except as provided in this subdivision, a retailer is not a
8 “retailer engaged in business in this state” under paragraph (2) of
9 subdivision (c) if that retailer’s sole physical presence in this state
10 is to engage in convention and trade show activities as described
11 in Section 513(d)(3)(A) of the Internal Revenue Code, and if the
12 retailer, including any of his or her representatives, agents,
13 salespersons, canvassers, independent contractors, or solicitors,
14 does not engage in those convention and trade show activities for
15 more than 15 days, in whole or in part, in this state during any
16 12-month period and did not derive more than one hundred
17 thousand dollars (\$100,000) of net income from those activities
18 in this state during the prior calendar year. Notwithstanding the
19 preceding sentence, a retailer engaging in convention and trade
20 show activities, as described in Section 513(d)(3)(A) of the Internal
21 Revenue Code, is a “retailer engaged in business in this state,” and
22 is liable for collection of the applicable use tax, with respect to
23 any sale of tangible personal property occurring at the convention
24 and trade show activities and with respect to any sale of tangible
25 personal property made pursuant to an order taken at or during
26 those convention and trade show activities.

27 ~~(f)~~

28 (e) Any limitations created by this section upon the definition
29 of “retailer engaged in business in this state” shall only apply for
30 purposes of tax liability under this code. Nothing in this section is
31 intended to affect or limit, in any way, civil liability or jurisdiction
32 under Section 410.10 of the Code of Civil Procedure.

33 SEC. 2. *The provisions of this act are severable. If any*
34 *provision of this act or its application is held invalid, that invalidity*
35 *does not affect other provisions or applications that can be given*
36 *effect without the invalid provision of application.*

37 SEC. 3. *The sum of one thousand dollars (\$1,000) is hereby*
38 *appropriated from the General Fund to the State Board of*
39 *Equalization for administrative operations.*

~~SEC. 2.~~

SEC. 4. This act addresses the fiscal emergency declared and reaffirmed by the Governor by proclamation on January 20, 2011, pursuant to subdivision (f) of Section 10 of Article IV of the California Constitution.

SEC. 5. *This act is a bill providing for appropriations related to the Budget Bill within the meaning of subdivision (e) of Section 12 of Article IV of the California Constitution, has been identified as related to the budget in the Budget Bill, and shall take effect immediately.*

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